CHEAH KIM TONG & ANOR.

v.

TARO KAUR

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[CIVIL SUIT NO. 22-31-86]
21 APRIL 1989

LAND LAW: *Trespass - Equitable estoppel - Search - Section 9(1), 9(2)(b) of the Limitation Act 1953 - Section 341 of the National Land Code 1965 - Plea of laches - Concept of "fair result" - Mandatory injunction - Interlocutory application - Special circumstances.*

The plaintiffs, the registered owners of Lot No. 781 filed an action claiming an order for the defendant to remove part of the defendant's house encroaching on Lot 781 and for damages for trespass.

The defendant was a TOL holder in respect of Lots 777 and 779, as well as the owner of a building erected on the said lots.

Held:

[1] Section 9(1) of the Limitation Act 1953 does not apply to a trespass which was a continuing one. In a continuing trespass a fresh cause of action arises from day to day.

[2] Further, by virtue of s. 9(2)(b) of the Limitation Act 1953 and the corresponding s. 341 in the National Land Code 1965, the issue of limitation does not arise.

[3] The word "laches" on this context means more than a mere delay, it means such delay amounting to acquiescence in that there is a complete violation of rights and the plaintiff has become aware of it. He either assents to it or his delay in asserting his right has been so inordinate as to give rise to an inference of such assent.

[4] A mandatory injunction can be granted on an interlocutory application even if it means granting virtually the very remedy of the Court action without a full trial, when there are special circumstances.

[Order accordingly.]

Cases referred to:

Re Pauling's Settlement Trusts, Younghusband v. Corttes & Co. [1962] 1 WLR 86
Tay Tuan Kiat & Anor. v. Pritam Singh Brar [1987] 1 MLJ 276
Shepperd Homes Ltd. v. Sandham [1971] Ch D 340
Charrington v. Simons Co. Ltd. [1970] 1 WLR 725
Kelk v. Pearson [1871] 6 Ch App 809
Smith v. Smith [1875] 35 Ch D 681
Allport v. Scientist Corp. [1985] 64 LJ Ch 491

Legislation referred to:

Limitation Act 1953, s. 9(1)
National Land Code 1965, s. 341

For the plaintiff - Choy Kam Lee; M/s. K.C. Lai & Co.
For the defendant - R. Naidu; M/s. R. Naidu & Co.

JUDGMENT

Peh Swee Chin J:

The plaintiffs, the registered owners of land held under Grant No. 17875 for Lot No. 781, in the Mukim of Bidor, (hereafter called the lot 781) filed an action-claiming an order or injunction for the defendant to remove part of the defendant's house encroaching on lot 781 and for damages for trespass etc.; the defendant being the holder of a temporary occupation licence issued by the relevant Land Office covering adjoining lots 777 and 779 in the same Mukim of Bidor; as well as being the owner of a building substantially of wood and partly of concrete erected on lots 777 and 779, i.e. the adjoining lots.

By summons in chambers (encl. 7), the plaintiffs asked that the defendant to remove the encroaching portion of her house, and be restrained from trespassing and further asked for damages and costs.

At the end of hearing of submission from both Counsels, the Court granted an order in terms stated above except that the time for removing the encroachment be 4 months, failing which the plaintiffs be at liberty thereafter to remove the same at the cost and expense of the defendant from whom the plaintiffs be entitled to recover such cost and expense, and further that the damages, if any, be assessed by the learned Registrar of this Court, and be paid to the plaintiffs.

I now give my reasons in writing.

Despite the denial of the defendant in regard to the said encroachment, a survey report filed by the defendant himself showed the encroachment and such denial was therefore devoid of merit.

The first issue raised by the defendant was estoppel and acquiescence. This expression, "estoppel and acquiescence" is apt to give rise to some confusion unless one bears in mind that the acquiescence is an element in the estoppel which is an equitable one. Learned Counsel for the defendant, in this connection submitted that the house was built in 1968 and that the plaintiffs had become the registered owners only in July 1980. Scrutiny of the defendant's affidavit in this connection also showed that the previous owner of the plaintiff's land had never raised any issue of the encroachment.

Such was the scanty material on which the defence of equitable estoppel depended. The Court perused the document of title of lot 781 and the previous registered owner who might possibly have been guilty of words or conduct giving rise to such equitable estoppel was one Soundaram d/o Karupan Chettiar who was such owner from 20 December 1956 to July 1980 when the plaintiffs became the registered owner. It was never even alleged that the said Soundaram, had behaved in any way or spoken in any way that such equitable estoppel as was relied on by the defendant had arisen against her, and therefore the plaintiffs, the present owners. It did not appear to be disputed that the plaintiffs had not acted in any way to be so estopped from asserting their rights as owners. It would be wrong and also imposing an impossible burden on this Court to imagine or suggest how the said Soundaram (whose name was never even mentioned by the defendant) had conducted herself in certain ways with regard to this equitable estoppel. The defence based on it therefore failed.

Next, it was submitted on behalf of the defendant that the plaintiffs should have made a search in the Land Office (or rather the Registry of Titles, Perak) at the time of purchase of lot 781 to find out if lot 781 was free from an encumbrance. The short answer would be too obvious; the Registrar of Titles would not register an encumbrance such as encroachment of one's building on another's land.

Next, it was submitted that plaintiff's action was barred by limitation of time, i.e. s. 9(1) of the Limitation Act 1953. Section 9(1) provides:

> No action shall be brought by any person to recover land after the expiration of twelve years from the date on which the right of action accrued to him, or it first occurred to some person through whom he claims, to that person:
>
> [2] Nothing in this section... shall be deemed to apply.
>
> (a) ...
>
> (b) to any person registered under or by virtue of the provision of the National Land Code as the proprietor of the land sought to be recovered or to any person claiming through a person so registered, except to the extent so registered, except to the extent that such Code provides or permits.

Learned Counsel for the plaintiffs submitted that the trespass was a continuing one, and still continued.

I agree with the submission about the continuing trespass. In a continuing trespass a fresh cause of action arises *di die in diem* i.e. from day to day. This would alone dispose of the defendant's contention.

However the defendant had raised s. 9 of the Limitation Act 1953, but he forgot to mention s. 9(2) (b) set out above. The corresponding section in the National Land Code for the s. 9(2)(b) of Limitation Act 1953 must be s. 341 of the National Land Code 1965 which provides as follows:

> Section 341. Adverse possession of land for any length of time shall not constitute a bar to the bringing of any action for the recovering thereof by the proprietor or any person or body entitled to or interest therein and accordingly, the Limitation Ordinance 1953, shall in no circumstances operate to extinguish any title to or interest in land.

Section 341 of the National Land Code 1965 speaks for itself. Quite apart from the aspect of limitation of action, this s. 341 would appear to reinforce and strengthen the principle of indefeasibility of title as enshrined in the forgoing s. 340 of the National Land Code 1965.

Next it was submitted that the damage to the plaintiffs was negligible or trivial and there was no evidence of damage at all. The short answer would be that any trespass, as in this case, was even actionable *per se* i.e. without any necessity to prove an actual damage. For reasons I will give later, the damage or injury was in fact very serious to the plaintiffs.

In addition to limitation, learned Counsel for the defendant also pleaded laches by submitting, that action was filed in February 1986 when the plaintiffs first raised the question of encroachment in correspondence in September 1980. Learned Counsel for the plaintiffs' reply was that negotiations had been going on between the parties and time had been given to the defendant to remove the encroachment and that it was unfair for the defendant now to say that the plaintiffs had delayed filing the action.

Plaintiffs became owners in 1980 and on 18 September 1980, the plaintiffs wrote requesting the defendant to remove the encroachment. On 6 October 1980, a Member of Parliament took up the matter for the defendant and wrote to the plaintiff's solicitors asking for 3 month's time to remove it. Time appeared to have been given to the defendant. Having regard to the nature of trespass, the correspondence, I did not think there was any inordinate delay in filing the present action on the facts.

The word "laches" is one of the most over-worked words in legal arguments before the Courts and it does not seem to have been fully appreciated for its nature. It means definitely something more than a mere delay, it means such delay amounting to acquiescence. Here the word acquiescence is not quite the same acquiscence as used in equitable estoppel, where, generally a plaintiff stands by watching a violation of his right in progress and keeping silence, but here, there is a completed violation of rights and a plaintiff has become aware of it. He either assents to it, or his delay in asserting his right has been so long as to give rise to an inference of such assent. Regard must be had to the charge in a defendant's position which has resulted from a plaintiff's delay in bringing an action. On the facts in the instant case, the plaintiffs had not been guilty of laches in the sense just stated, though I had a suspicion that the Counsels were speaking merely of mere inordinate delay.

However, in this case, the Court also observed that there was a provision of statutory bar, i.e. s. 9 of the Limitation Act 1953, and the defence of laches would not have applied in any event for the plaintiffs should be entitled to the full statutory period before their claim became unenforceable. Please see *Re Pauling's Settlement Trusts, Younghusband v. Corttes & Co.* [1962] 1 WLR 86, 115 and *Tan Tuan Kiat & Anor. v. Pritam Singh Brar* [1987] 1 MLJ 276.

Lastly it was submitted that it would produce a very unfair result to the defendant if a mandatory injunction of the nature asked for was granted. Counsel cited the Singapore case of *Tay Tuan Kiat & Anor. v. Pritam Singh Brar* [1987] 1 MLJ 276. In that case, the plaintiff built an almost perpendicular retaining wall at a slope near the common boundary, occupying an area of approximately 11.8 sq. metre of the plaintiff's land there. The defendant there also built (a) a chain-link fence along the edge on top of the retaining wall, the fence being then on the plaintiff's land, and (b) a hut, part of which also stood on plaintiffs' land. Thean J held, adopting the concept of the "fair result" relied on by Megarry J in *Shepperd Homes Ltd. v. Sandham,* [1971] Ch D 340 and by Buckley, J in *Charrington v. Simons & Co. Ltd.,* [1970] 1 WLR 725 that it would be inequitable to order the demolition of the retaining wall after considering various relevant factors in that case but ordered the removal of the chain link fence from the plaintiff's land to the common boundary, and further ordering the demolition of the hut; RM500 as nominal damages, and two-thirds of the costs.

The learned Counsel for the plaintiffs in the instant case tried to persuade the Court that the Singapore case was distinguishable, for in that case the facts were different from those in *Tay Tuan Kiat*. In my view the details of facts in both cases might be different, but the situations and infringement of plaintiffs' right were broadly similar, except for two significant facts. First, the defendant's land was under a "TOL" renewable from year to year carrying no legally recognizable right to any document of title while that of the plaintiffs was covered by a grant in perpetuity. Secondly, the plaintiff's vacant land was subject to an express condition endorsed on the document of title, that a shop house was to be built on the plaintiff's land which was 20 feet wide both in front and back. A width of 20 feet for a shop would be slightly less than the normal width of a shop house, no architect would be required to assist on this. The express condition, if not fulfilled, would render lot 781 liable to forfeiture

to the State Authority of Perak. The fulfillment of the express condition could become quite impossible with the defendant's largely wooden house protruding into lot 781. The concept of the fair result would be applicable in the instant case in favour of the plaintiffs.

I was fully aware that the injunction asked for in this case was a mandatory injunction, that it was being asked for on an interlocutory application, and that, if granted it would virtually be the very remedy of this civil action without a full trial.

I will deal with the special circumstances considered by the Court in this connection. There was no doubt of the plaintiff's right to possession of lot 781, and the violation of that right was not in dispute as the encroachment was admitted by the defendant from whom a survey plan showing the encroachment was filed in Court in addition to that of the plaintiffs. The injury done to the plaintiff's, could not be adequately compensated for by damages, and the injury was so serious in the circumstances of this case that the restoration of the condition before the encroachment took place would be the only way to do justice sufficiently to the plaintiffs. Please see *Kelk v. Pearson* [1871] 6 Ch Ann 809; and *Smith v. Smith* [1875] 35 Ch D 681. I also thought that the case was so clear it ought to be decided at once. Please see *Allport v. Scientists Corp.* [1895] 64 LJ Ch 491.

A mandatory injunction can be granted on an interlocutory application before trial, when there are special circumstances which existed in this case as stated in the above paragraph; whereby it was granted I did not think it appropriate to impose a condition providing for the usual undertaking as to damages as I decided that the case ought to be decided at once, it being so clear and beyond doubt.

I therefore made an order in terms as stated earlier.

Also found at [1989] 2 CLJ 791